82-900

CASE NO.

in the Supreme Court of the United States

OCTOBER TERM 1982

CLIFTON RAY MIDDLETON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I.

WHETHER THE LOWER COURT ERRED IN DENYING THE PETITIONER'S MOTION TO DISMISS, WHERE THE CLASSIFICATION OF MARIJUANA AS A SCHEDULE I CONTROLLED SUBSTANCE OF TITLE 21, *UNITED STATES CODE*, SEC. 812(c)(10), AS WELL AS THE STATUTES UNDER WHICH THE PETITIONER WAS CHARGED ON THE BASIS OF THIS CLASSIFICATION, ARE ARBITRARY AND IRRATIONAL?

II.

WHETHER, AS APPLIED TO A MEMBER OF THE ETHIOPIAN ZION COPTIC CHURCH FOR WHOM THE USE OF MARIJUANA IS AN INDISPENSABLE PART OF HIS RELIGION, THE STATUTES PROHIBITING THE POSSESSION AND IMPORTATION OF MARIJUANA VIOLATE THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION?

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The Petitioner, CLIFTON RAY MIDDLETON, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit, entered in the above-styled case on November 1, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals, printed in Appendix A hereto, *infra*, (App. 1-15) is reported at __ F.2d __ (5th Cir. 1982).

JURISDICTION

The judgment of the Court of Appeals was entered on November 22, 1982, Appendix B, *infra* (App. 16-17). No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Rule 22, *Rules of the United States Supreme Court.*

STATUTES INVOLVED

The Federal statutory provisions involved, 21 U.S.C. 841(a)(1), 846, 952(a) and 963, are set forth in Appendix C, *infra* (App. 18-19). The statutory authorization for appeals from final judgments of the Circuit Courts, 28 U.S.C. 1254(1), is set forth in Appendix D, *infra* (App. 20).

STATEMENT OF THE FACTS

On April 20, 1972 the Petitioner was indicted in a seven count indictment charging offenses allegedly committed on April 11, 1972. Count I charged importation of approximately 3½ pounds of marijuana in violation of 21 U.S.C. Sections 952(a) and 963. Count II charged that the defendant possessed with intent to distribute that same volume of marijuana in violation of 21 U.S.C., Sections 841 and 846. The remaining counts do not concern these proceedings.

The defendant moved to dismiss the indictment, alleging that the statutory prohibitions pertaining to marijuana were unconstitutional *per se* and as applied to him. The motions were denied and the denial affirmed by the Court of Appeals. (See App. A).

The jury found the Petitioner not guilty of possession of marijuana with intent to distribute but convicted him of the lesser included offense of possession of marijuana, and the Petitioner was sentenced to nine months imprisonment on Counts I and II, to be served concurrently with each other.

REASONS FOR GRANTING THE WRIT

1. Whether the Circuit Court erred in affirming the lower court's denial of the Petitioner's pre-trial motion to dismiss the alleged marijuana violation on grounds of due process and equal protection of the laws, in violation of the Fifth Amendment of the United States Constitution where the classification of cannabis as a Schedule I controlled substance under Title 21,

United States Code, Section 812(c)(10) and the statutes under which the Petitioner was charged are arbitrary and irrational?

The first question presented concerns a fundamental question of this Court's earlier interpretation on due process grounds of statutory enactments which, due to later events, are declared invalid due to arbitrariness and irrationality. It requires this Court to extend earlier decisions such as *Chastleton Corporation v. Sinclair*, 264 U.S. 543 (1924); *United States v. Carolene Products*, 304 U.S. 144 (1938); *South Carolina Highway Department v. Barnwell Brothers*, 303 U.S. 177 (1938); *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955); *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973); and *Craig v. Boren*, 429 U.S. 190 (1976).

Although federal statutes are presumptively valid, upon review a court may generally find such acts invalid where it is shown that the statute in question bears no rational relationship to a legitimate legislative purpose. *Craig v. Boren*, *United States Dept. of Agriculture v. Moreno*, *Williamson v. Lee Optical of Oklahoma, Inc.*, *United States v. Carolene Products*, and *South Carolina Highway Dept. v. Barnwell Bros.*, all *supra*. A legislative declaration of facts may be reasonable when enacted but will not insulate the statute from judicial review, where, as here, the facts, if they ever existed, no longer do. *Leary v. United States*, and *Chastleton Corp. v. Sinclair*, both *supra*. "Regulations under the police power, although valid or presumed valid when made, may become arbitrary and irrational in the light of later events." *Chastleton Corp. v. Sinclair*, *id.*, at 547-48.

In *Leary v. United States, supra,* this Court was presented with a challenge to 21 U.S.C. 176(a), which provided that persons who possessed marijuana in the United States would be presumed to know that marijuana had been illegally imported and after surveying a mass of reports, studies and articles by experts on the cultivation, importation and distribution of marijuana, concluded that in light of the empirical data, the legislative presumption was invalid. *See also Turner v. United States,* 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed2d 610 (1970); *Block v. Hirsch,* 256 U.S. 135 (1921).

In *United States v. Carolene Products Co., supra,* this Court stated, at 314 U.S. 153-154:

> "(W)e recognize that the constitutionality of a statute, valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason because the article, although within the prohibited class, is so different from others of the class to be without with reason for the prohibition."

Such is the case here. Emperical evidence and expert testimony, clearly demonstrated that marijuana, "although within the prohibited class, is so different from others of the class as to be without the reason for the prohibition. . . ." The Circuit Court's refusal to employ the data and declare the classification of marijuana irrational or unreasonable must be reversed.

21 U.S.C. Section 812 established five (5) schedules of controlled substances: Schedules I through V.

Subsection (b) of the statute requires that a drug or other substance placed in Schedule I must be one:

(a) which has a high potential for abuse;

(b) which has no currently accepted medical use in treatment in the United States;

(c) for which there is a lack of accepted safety for its use under medical supervision.

Also in Schedule I are drugs such as heroin, morphine, barbiturates, codeine, LSD, mescaline and psilocybin. Opium and cocaine are Schedule II controlled substances[1] Amphetamines are classified as Schedule III controlled substances.[2] Alcohol and tobacco are not scheduled as controlled substances.

The lower court heard testimony from several defense witnesses, the first being Dr. Thomas Ungerleider, a psychiatrist and professor of psychiatry at the UCLA Medical Center, a President Nixon appointee to the National Commission on Marijuana and Drug Abuse

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[1]Schedule II controlled substances are those defined as having a high potential for abuse which may lead to severe psychological or physical dependence but which have a currently accepted medical use and treatment in the United States or a currently accepted medical use with severe restrictions.

[2]Schedule III controlled substances are those which have a lesser potential for abuse than the drugs or substances in Schedules I and II, where abuse of these substance may lead to moderate or low physical dependence or high psychological dependence, and which have a currently accepted medical use and treatment in the United States.

and a President Carter appointee to the Drug Abuse Task Force of the Mental Health Commission.

The National Commission on Marijuana and Drug Abuse concluded: that there was no causal relationship between the use of marijuana and violent crime, loss of motivation (use of other drugs, chromosone or brain damage; that marijuana was neither physically nor psychologically addictive; and that the use of marijuana was not a threat to the public health, safety, or welfare of the country. The Commission recommended that the penalties for the use of marijuana be eliminated.

Dr. Ungerleider also conducted a three year study funded by the National Cancer Institute on the therapeutic effects of the active ingredient of marijuana, tetrahydrocannabinol (THC, hereafter) the treatment of the nausea and vomiting many cancer patients suffer as a result of radiation therapy and chemotherapy. The result: THC helped alleviate nausea and vomiting in some patients, particularly those who had not been helped by compazine, the standard treatment.

Dr. Ungerleider testified that marijuana does not satisfy criteria used to define a Schedule I controlled substance and that in 1979, a Federal Food and Drug Administration Committee concluded that THC does not belong in Schedule I.

Dr. Ungerleider's testimony was corroborated by Dr. Lester Grinspoon, a psychiatrist and associate professor of psychiatry at Harvard Medical School who reviewed all of the prior-in-depth studies of marijuana conducted by official or semi-official commissions. The

first, the "Indian Hemp Drugs Commission" concluded that there was no evidence of any moral or mental deterioration as a consequence of the use of marijuana and posed no more of a threat to the public health than alcohol.[3]

The next was the New York Academy of Medicine's report entitled, *The Marijuana Problem in the City of New York* (1944) the "LaGuardia Report" which concluded that marijuana was not addictive, did not lead to crime, sexual overstimulation or any kind of psychological deterioration. Others included the National Commission on Marijuana and Drug Abuse, a study conducted at UCLA in 1972 which involved some 1400 students, the report of the Canadian Commission of Inquiry into the non-medical use of drugs, entitled *Cannabis* (1972) (the "LeDain Report") and a study funded by the National Institute of Mental Health which resulted in the publication of a book entitled *Ganja in Jamaica* (1975). Dr. Grinspoon concluded: there was insufficient clinical evidence to support much of the mythology and misinformation about marijuana; the use of marijuana did not lead to one's loss of motivation; there was no valid clinical evidence linking the use of marijuana to brain damage, gynechomastia (the development of breasts in young men), impairment of the body's immunity system, or chromosome damage. Also, there is no such thing as a "cannabis psychosis," it is impossible for a

[3]See also the testimony of Theres Andrysiak, project director of the UCLA study (S-III pp. 106-07, 109-10, 114) and Chris Chambers, a cancer patient whose use of marijuana was accompanied by the substantial relief from the nausea and vomiting he had been experiencing. References here are to the Original Record on Appeal before the Eleventh Circuit.

person to take a lethal overdose of marijuana and marijuana is clearly safer than alcohol or tobacco.

Dr. Grinspoon's professional opinion: marijuana is not a substance that has a high potential for abuse, nor is it a substance that has no currently accepted medical treatment in the United States, nor is there a lack of accepted safety for its use under medical supervision.

Robert Randell, who suffers from chronic optical glaucoma, was prognosed that he would suffer a complete loss of vision within three to five years notwithstanding treatment by conventional medical therapy. In 1973, Randell, noticed that the symptoms of his disease would disapear when he smoked marijuana and that they did not reappear when he smoked marijuana on a regular basis. In 1975, Mr. Randell was admitted into a thirteen-day experiment conducted at UCLA for the purpose of studying the effects of marijuana on vision. He discovered that while oral administration of THC is ineffective, smoking marijuana, *in tandem* with the use of some conventional medicines, was the therapy most effective in controlling his illness.

Except for one four month hiatus, Mr. Randell *has been supplied with marijuana grown and distributed by the federal government since 1976. Randell smokes ten government-supplied marijuana cigarettes per day.* He does not experience any intoxification and there has been no disintegration or deterioration of his visual capacity since he secured legal access to marijuana in 1976.

Dr. Jeffrey Schaeffer, a psychologist specializing in neuropsychology, the study of the behavior of the function of the brain, tested the effects manifested on the brain of along term heavy marijuana users. He administered psychometric tests to ten members of the Ethiopian Zion Coptic Church including the Petitioner. All of the subjects smoked marijuana at testing time had an exceedingly high amount of cannabinoid in their urine and blood. Dr. Schaeffer was unable to discover any evidence of any cognitive or mental function impairment.

Five medical reports were considered by the trial court. (See original record on appeal to the Eleventh Circuit, S-I Exs. A-E; S-V p. 92). The first neuropathy, found no evidence of any obvious changes in mental status. ("The people appeared to be alert, coherent, well-oriented and integrated with no evidence of any encephalopathy or intoxication.") The second noted (S-I Ex. "B") The Coptics smoke marijuana almost constantly and particularly in the Jamaican group of Coptics, many members have been smoking marijuana on a constant daily basis for more than forty years and found that the Coptics do not exhibit the acute or short-term side effects which have been commonly associated with marijuana. The Coptics do not get "high" or "stoned" and did not display any sensory distortion, lapses of attention, impaired intellectual or cognitive functioning, memory disturbances or impairment of concentration. The report documents a lack of the so-called "amotivational syndrome" which has been erroneously associated with marijuana use.

Many of the Jamaican Coptics examined, ranging to a 71 year old man, had been smoking marijuana daily

since early childhood with no apparent psychological illeffects: no depression, anxiety or organic brain syndrome.

Exhibits "C," "D" and "E" confirmed that members of the Ethiopian Zion Coptic Church are in good physical health and consume healthful, nutritional diets and that the nutritional health of Coptics in both Miami and Jamaica appeared good.

The foregoing evidence clearly demonstrates the arbitrariness in classifying marijuana, as a Schedule I drug. It does not meet any, let alone all, of the criteria used to classify controlled substances.

Marijuana *does* have a currently accepted medical use in treatment in the United States. 32 states authorize its distribution to qualifying physicians for medicinal purposes, such as the treatment of nausea and ill effects resulting from cancer therapy and the treatment of glaucoma. The federal government has recognized marijuana as having valid medical use. And on September 10, 1980, the Food and Drug Administration (FDA) approved the wider use of THC capsules for experimental treatment of nausea and vomiting in cancer patients, making THC available through the National Cancer Institute to about 4,000 specialists for their patients.

In *National Organization for the Reform of Marijuana Laws v. Drug Enforcement Administration*, 559 F.2d 735 (D.C. Cir. 1977) a Circuit Court ordered the DEA to reconsider new scientific and medical findings and recommendations on rescheduling marijuana but to date the order has not resulted in new hearings.

While the actions taken by the FDA and the D.C. Circuit Court of Appeals have cast grave doubts on the rationality of the classification of marijuana, and the DEA has not conducted court ordered hearings, bold state judiciaries have reacted with objectivity. In *State v. Zornes*, 78 Wash.2d 9, 469, P.2d 552 (1970), and *People v. McCabe*, 49 Ill.2d 338, 275 N.E. 407 (1971), the Supreme Courts of Washington and Illinois reversed convictions for possession of marijuana under a statute which classified marijuana as a narcotic, concluding that such a statutory classification was arbitrary and irrational.

See also: *People v. Lorentzen*, 387 Mich. 167, 194 N.W.2d 827 (1972); *People v. Sinclair*, 387 Mich. 91, 194 N.W.2d 878 (1972); *Raven v. State*, 537 P.2d 434 (1975); *State v. Anonymous*, 32 Conn. Sup. 324, 355 A.2d 729, (1976); *State v. Carus*, 18 N.J. Super.159, 286 A.2d 740 (1972); *Sam v. State*, 500 P.2d 291 (Okla. Ct. Crim. App. 1972).

It is time the irrational classification of marijuana as a Schedule I drug be so declared, especially in view of the DEA's refusal to conduct the very hearings needed to gain administrative and legislative review of that antiquated classification.

2. Whether the lower courts' rulings violated the Free Exercise Clause of the First Amendment to the United States Constitution by their rulings that the statutes prohibiting the possession and importation of marijuana applied against this Petitioner, an undisputed member of the Ethiopian Zion Coptic Church, for whom the use of marijuana is an indispensable part of the religion, and whether there was an equal violation

based upon the refusal to allow the Petitioner to present evidence to the jury on his First Amendment defense?

The second question presented concerns an equally fundamental question of the propriety of the Eleventh Circuit's analysis of this Court's decision in *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). It requires the Court to review the "balancing" process employed by the Circuit Court in concluding that *Yoder's* applicability to a state's compulsory school attendance law is different in nature than the governmental interest involved in proscribing the mere possession of small amounts (3½ pounds) of marijuana employed exclusively in the exercise of religious tenets. Though no prior decision of this Court has exempted the religious use of marijuana from the general prohibition, no prior case has involved a Free Exercise assertion on behalf of a petitioner who is a member of an organized church and who clearly established the indispensability and centrality of marijuana to a *bona fide* system of religious belief.

The federal statute prohibiting the importation and possession of marijuana, as applied in this case, violated the Free Exercise Clause of the First Amendment. The Petitioner proved that he was a dedicated member of the Ethiopian Zion Coptic Church, that the church is a "religion" within the meaning of the First Amendment and that the use of marijuana is an essential portion of his religious practice. The lower courts' refusal to dismiss or to allow the presentment of a "free exercise of religion" defense to the jury cannot be tolerated by this Court.

Dr. Melanie Dreher, a doctorate in Anthropology and teacher of Anthropology at the Columbia University School of Public Health, testified without refute: although the church's members claim that the doctrine and symbolism of the church date back 6,000 years to the ancient Ethiopian Coptic Church, the connection between the two is revitalistic rather than historical. The Ethiopian Zion Coptic Church originated in the early 1940's under the leadership of a Jamaican named Lova Williams, a disciple of Marcus Garvey. Williams soon developed disciples of his own, among them Brother Laurenton Dickens, a church elder and a witness.

Today the Coptic community in White Horses, Jamaica is a normal, healthy and integrated community. There is a dwelling area of approximately thirteen houses, a tabernacle and a dining area. Much of the land has been cleared, roads have been developed on the property and most of the remainder of the land is under cultivation. It also engages in coal and coconut oil production. Several irrigation systems as well as a lumber mill have been constructed and are in operation.

Religion is the major organizing force of the Coptic community. Formalized prayer service begins at 3:00 a.m., and lasts until 6:00 a.m. Then the secular work of the church community is carried on from about 6:00 a.m. to 3:00 p.m., when the church members reconvene for another prayer service which lasts until 5:00 p.m. The church members reconvene at 8:00 p.m. for the third prayer service which usually lasts until 11:00 or 11:30 p.m. The services are ordinarily conducted in a building called the tabernacle. The service itself consists of a series of alternating hymns and psalms. All the

psalms must be memorized by each church member prior to his initiation into the church.

One of the brethren is responsible for filling the sacred pipe (or chalice) with marijuana and taking it to the chief presiding elder to be lit, whereupon the pipe is passed among the brethren. A separate pipe is lit for the women, who are segregated from the men during prayer services. Only those members of the church who have confessed will participate and smoke the pipe. A member who has transgressed the doctrine of the church, will have the pipe passed around him. New individuals and guests are not offered the pipe. The sacred pipe is smoked continuously during the entire service.

Although Coptics consider themselves to be Christians, they do not accept the belief that man and God are separate, as do other Christian faiths. The doctrine of the Ethiopian Zion Coptic Church is from two (2) sources: the King James version of the Bible. The Coptics view God as being embodied in every man, so that each time one man talks to another, or each time a man looks into himself, he is essentially communicating with God. Thus, because man is God and God is man, the people are the church. The church is not defined as the place where people go to worship.

Marijuana is the sacrament of the church. The Coptics believe that marijuana opens the spirit to a greater communication with God. The use of marijuana is absolutely integral to the beliefs and practices of the church. "You cannot be a Coptic unless you partake on the sacrament, and the sacrament is marijuana. Without marijuana there is no religion.

The Coptics do not use marijuana for the purpose of becoming intoxicated or "high." Coptics oppose the recreational use of marijuana which they regard as sinful.

Members of the church are subject to a rigid set of injunctions. For example, drinking alcohol and dancing are forbidden. Coptics adhere to the law of Leviticus regarding food. Women are segregated from the rest of the Coptic community during their menses and after child birth. Some members do leave the church because of their unwillingness or inability to abide by its structures.

Dr. George C. Bond is a doctorate in Anthropology, a member of the faculty at Teacher's College at Columbia University, Department of Philosophy and Sciences in the program of Applied Anthropology. His sub-specialty is in the area of religion and politics. Dr. Bond concludes that the practices and doctrine of the Ethiopian Zion Coptic Church constitute a religion.

Laurenton Dickens of Jamaica, an elder of the Ethiopian Zion Coptic Church, has been smoking marijuana on a daily, almost constant basis for more than fifty years. Dickens instructed the Petitioner[4] in the teachings and ways of the Coptic Church, including how to smoke marijuana. Dickens confirmed the doctrine and practices of his religion in theological terms.

"The term 'free exercise' necessarily implies action, not merely thought processes. It mandates protection

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[4]Thus it is noteworthy that the defendant, who joined the Coptic Church in 1971, remains a member to this day. (T. p. 464).

from action which springs from religious belief as well as protection from belief itself." Worthing, *"Religion" and "Religious Institutions" Under the First Amendment*, 7 Pepperdine L.Rev. 313, 315 (1980).

In *Wisconsin v. Yoder*, 406 U.S. 205, 215, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) this Court held that conduct which is an inseparable part of an individual's sincerely held religious beliefs can be forbidden only where the state shows an interest "of the highest order." This Court emphasized, "(T)here are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the state to control, even under regulations of general applicability," 406 U.S. at 220 and unless the religious conduct poses "some substantial threat to public safety, peace or order," it cannot be prohibited or penalized. *Id.* at 230.

The nature of the government's burden in this case was defined in *Sherbert v. Verner*, 374 U.S. 398, 406, 83 S.Ct. 1790, 10 L.Ed.2d at 965 (1963). In holding that a Seventh-Day Adventist could not be denied unemployment compensation because of her refusal to work on Saturdays, this Court declared that a religious practice could be penalized only if the state could show "the gravest abuse, endangering paramount interests . . ." It was insufficient, this Court held, to show "merely . . . a rational relationship to some colorable state interest . . ." *Id.*

Yoder, is foursquare to the Petitioner's claims here. The question in *Yoder* was whether the State could enforce its mandatory education laws, requiring attendance of all children until the age of 16, against

the members of the Amish Religion who refused on religious grounds to send their children to school beyond the eighth grade. The Amish objection to education of their children beyond the eighth grade was "firmly gounded in . . . central religious concepts." 406 U.S. at 210. They believed that education beyond the eighth grade placed children "in an environment hostile to Amish belief," *Id.* at 211, that it removed children from their community during the period of their life when they must "acquire Amish attitudes" and "interposed a serious barrier to the integration of the Amish child into the Amish religious community." *Ibid.* Expert testimony also showed that requiring attendance of Amish children at school beyond the eighth grade would "ultimately result in the destruction of the Old Order Amish church community as it exists in the United States today." *Id* at 221.

The court described the Amish view on education as "not merely a manner of personal preference, but one of deep conviction, shared by an organized group and intimately related to daily living . . . (T)he Old Order Amish religion pervades and determines virtually their entire way of life, regulating it with the detail of the Talmudic diet through the strictly enforced rules of the church community. *Id.* at 216. The court concluded that to require Amish children to attend school beyond the eighth grade would "contravene . . . the basic tenents and practice of the Amish faith . . .," *Id.* at 218, and "gravely endanger if not destroy the free exercise of respondents' religious beliefs." *Id.* at 219.

The State of Wisconsin had asserted that its "interest in universal compulsory formal secondary education to age sixteen . . ." was paramount. This Court refused

to accept the State's "sweeping claim," holding instead that it "must searchingly examine the interests that the State seeks to promote by its requirements for a compulsory education to age 16, and the impediment to those objectives that would flow from recognizing the claimed Amish exemption . . ." (*Id.* at 221); and concluded that, as important as that policy was, "it would require a more particularized showing from the State . . . to justify the severe interference with the religious freedom . . .". *Id.* at 227.

At bar is a religion within the meaning of the First Amendment which requires the use of marijuana as a central, essential and indispensable aspect of its practice.

The 3½ pounds of marijuana which the Petitioner was convicted of importing and possessing was given to him to be used solely for a divine purpose. A priest of the church, the Petitioner testified that he imported and possessed the marijuana so as to partake of this sacrament as his religion commands him to do. Without dispute Petitioner showed that his intended use of *this particular quantity of marijuana* was "firmly grounded in . . . his central religious beliefs."

The Petitioner sufficiently proved that marijuana "prevades . . . virtually (his) entire way of life," its use being intertwined with "the strictly enforced rules of the church community." *Yoder, supra,* 404 U.S. at 216. Not only does it play a critical role in the process of initiation into the church and in the formal worship services, but because God is within every man, there is total integration of the members' religious and secular lives. The principal sanction for violating a scriptural injunction is withdrawal of the right to smoke it.

If members of the Ethiopian Zion Coptic Church are prohibited from using marijuana, it would not just "gravely endanger . . . (but would) destroy the free exercise of . . . (their) religious beliefs." *Id.* at 219. To deny marijuana to members is to effectively isolate them from the community life of the church. Quite simply, w..hout marijuana the Coptic Church members cannot practice their religion.

Since the Petitioner demonstrated that the use of marijuana is an inseparable part of his sincerely held religious beliefs, the burden shifted to the government, to show that his use of marijuana posed a substantial threat to public safety, peace or order, endangering paramount interests. *Wisconsin v Yoder, supra,* 408 U.S. 205 at 230; *Sherbert v. Verner, supra,* 374 U.S. at 406. The evidence and argument presented in Part I of this brief, *supra,* pertaining to the relative harmlessness of marijuana, becomes pertinent to this issue as well as disqualified the government from meeting its burden. Three states, California, Arizona and Oklahoma, have allowed proscribed substances' use in church practice. *People v. Woody,* 40 Cal. Rptr. 69, 394 P.2d 813 (1964); *State v. Whittingham,* 19 Ariz. App. 27, 504 P.2d 950 (1973); *Whitehorn v. State,* 561 P.2d 539 (1977) use of peyote by members of the Native American Church.

> "We know that some will urge that is is more important to subserve the vigorous enforcement of the narcotic laws than to carve out of them an exception for a few believers in a strange faith. They will say that the exception may produce problems of enforcement and that the dictate of the state must overcome the beliefs

> of a minority of Indians. But the problems of enforcement here do not inherently differ from those of other situations which call for the detection of fraud. On the other hand, the right to free religious expression embodies a precious history of our heritage. In a mass society, which presses at every point toward conformity, the protection of a self-expression, however unique, of the individual and the group becomes ever more important. The varying currents of the subculture that flow into the mainstream of our national life give it depth and beauty . . ." *Id.* at 821

The Petitioner is entitled to the same constitutional protections by the federal judiciary to the charge of either or both importation or simple possession of the 3½ pounds of marijuana.

Also on the authority of *Yoder*, the Petitioner had a First Amendment right to defend himself at trial upon the grounds that his use of marijuana is an inseparable part of his system of sincerely held religious beliefs, and to show that its use within that system poses no threat to the public safety, peace or order. Such a defense, in essence, raised the *factual* issue of whether the 3½ pounds of marijuana was to be used for religious use or for illicit use. Such an issue is one for the jury to resolve, just as in any defense that raises disputed issues of fact. See, e.g. *Pierre v. United States*, 414 F.2d 163, 166 (5th Cir. 1966) (entrapment defense); *Smith v. Smith*, 454 F.2d 572 (5th Cir. 1971) (alibi defense); *United States v. Guanti*, 421 F.2d 792 (2nd Cir. 1970) (defense of Statute of Limitations); *United*

States v. Davis, 595 F.2d 7 (5th Cir. 1979) (insanity defense). As the United States Court of Appeals for the Fifth Circuit stated in *Roe v. United States*, 287 F.2d 435, 440:

> "No fact, not even an undisputed fact, may be determined by the judge. The plea of not guilty puts all in issue, even the most patent truths. In our federal system, the trial court may never instruct a verdict either in whole or in part."

At least, therefore, these proceedings should be remanded to allow the Petitioner fundamental rights via the Fifth Amendment's Due Process Clause, to present to the fact finders his First Amendment defense.

The evil which has been condoned by the decision below is plain. The Petitioner seeks no more than fundamental fairness in the application of the mandate of this Court in its interpretation of the Free Exercise Clause of the First Amendment as this Court itself would render. No less is expected within the federal criminal process. Because of the error as outlined above and the reasons for granting this writ, this petition is deserving of review by this Court.

CONCLUSION

For each and all of the foregoing reasons, it is respectfully submitted that a writ of certiorari should be granted by this Court.

Respectfully submitted,

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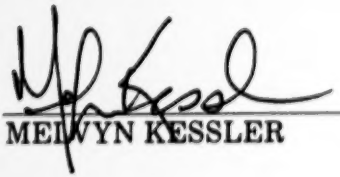
BY 
MELVYN KESSLER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed this 29th day of November, 1982 to: Solicitor General of the United States, Department of Justice Building, Washington, D.C. 20530.

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BY /s/ MELVYN KESSLER
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APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Clifton Ray MIDDLETON,
Defendant-Appellant.

Nos. 81-5321, 81-5640.

United States Court of Appeals,
Eleventh Circuit.

Nov. 1, 1982.

Defendant was convicted in the United States District Court for the Southern District of Florida, C. Clyde Atkins, Chief Judge, of importation of marijuana, simple possession of marijuana, assaulting, resisting or impeding customs officers, and bail jumping, and defendant appealed. The Court of Appeals, James C. Hill, Circuit Judge, held that: (1) congressional classification of marijuana as Schedule I controlled substance was neither arbitrary nor irrational; (2) any free exercise interest of defendant, who was dedicated member of religion using marijuana in its religious practices, was outweighed by compelling governmental interest in regulating and controlling use of marijuana and its distribution, and thus prosecution of defendant for importation and possession of marijuana did not violate his rights under

First Amendment; (3) evidence did not warrant instruction on self-defense; and (4) evidence was sufficient to establish that defendant "willfully" failed to appear, as required for defendant to have been properly found guilty of bail jumping.

Affirmed.

1. Constitutional Law—48(1)

Federal statutes are presumptively valid unless it be shown that the statute in question bears no rational relationship to legitimate legislative purpose.

2. Constitutional Law—48(6)

Court must limit its inquiry to whether legislative classification or refusal to reclassify is irrational or unreasonable.

3. Drugs and Narcotics—43

Congressional classification of marijuana as Schedule I controlled substance was neither arbitrary nor irrational. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 202, 202(b), 21 U.S.C.A. §§ 812, 812(b).

4. Constitutional Law—84

Any free exercise interest of defendant, who was dedicated member of religion using marijuana in its religious practices, was outweighed by compelling governmental interest in regulating and controlling use of marijuana and its distribution, and thus prosecution of defendant for importation and possession of marijuana

did not violate his rights under First Amendment. Comprehensive Drug Abuse Prevention and Control Act of 1970, §202(c)(10), 21 U.S.C.A. §812(c)(10); U.S.C.A. Const.Amend. 1.

5. Criminal Law—770(2), 772(6)

So long as there is some evidence relevant to issue or defense asserted, trial court must instruct jury regarding issue and cannot determine existence of defense as matter of law.

6. Customs Duties—134

In prosecution for willfully resisting customs officers, evidence did not warrant instruction on self-defense. 18 U.S.C.A. §111.

7. Bail—97(3)

Evidence was sufficient to establish that defendant "willfully" failed to appear, as required for defendant to have been properly found guilty of bail jumping. 18 U.S.C.A. §3150.

Appeals from the United States District Court for the Southern District of Florida.

Before HILL and CLARK, Circuit Judges, and SCOTT*, District Judge.

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*Honorable Charles R. Scott, U.S. District Judge for the Middle District of Florida, sitting by designation.

JAMES C. HILL, Circuit Judge:

This case consists of an appeal from convictions entered against the defendant for the crimes of importation of marijuana, possession of marijuana, resisting customs officers, and bail jumping.

The defendant, Clifton Ray Middleton, a member of the Ethiopian Zion Coptic Church, flew into Miami from Jamaica on April 11, 1972. Upon his arrival, the Customs Inspector asked Middleton to accompany him to a room for a secondary search of his baggage. Mr. Middleton then fled the customs enclosure, pursued by a number of customs personnel, and was caught. The defendant testified that he slipped and fell shortly after reaching the street and was set upon by several men as he tried to get up. Other evidence indicates that upon his capture, the defendant fought off the law enforcement officers by flailing his arms, kicking his feet, and squirming. Middleton continued this behavior as he was taken into the search room and later across the street to the public safety department. Marijuana was found in the defendant's possession and the defendant was taken into custody. On April 14, 1972, the defendant was released on a $10,000 personal recognizance bond and was advised at that time that he was required to report to the public defender three times per week. Middleton complied with this condition until the week ending May 5, 1972.

On April 20, 1972, a federal grand jury returned a seven count indictment against Middleton. Count I charged the defendant with importation of marijuana, a Schedule I controlled substance in violation of 21 U.S.C. §§ 952(a) and 963. Count II charged the defendant

with possession of marijuana with the intent to distribute in violation of 21 U.S.C. §§ 841 and 846. Counts III through VII charged the defendant with assaulting, resisting, or impeding certain customs officers in violation of 18 U.S.C. § 111.

The defendant was arraigned on May 2, 1972 at which time the magistrate announced his trial date was scheduled for May 22, 1972. His attorney at that time, William Stiles, testified that he had numerous discussions with the defendant regarding the trial date. Middleton did not contact the public defender's office from the day he was arraigned or any time thereafter prior to the trial date. Middleton failed to appear in court when his case was called for trial on May 22, 1972. On February 1, 1973, a federal grand jury indicted the defendant for bond jumping under 18 U.S.C. § 3150.

The defendant filed a motion to dismiss on January 16, 1980, alleging that the statutory prohibitions pertaining to marijuana are unconstitutional per se. Middleton also asserted that the statutory prohibitions were unconstitutional as applied to him as a member of the Ethiopian Zion Coptic Church. The trial judge denied this motion. Trial commenced on both indictments on February 11, 1981. The jury found the defendant guilty under count I; not guilty under count II of possession with the intent to distribute marijuana, but guilty of simple possession; and under counts IV, V, and VI. The judge directed a verdict of not guilty on count III and the jury acquitted Middleton on count VII. The trial judge sentenced the defendant to nine months imprisonment on counts I and II to be served concurrently. He also sentenced the defendant to nine months custody

on counts IV through VI to run concurrently with each other but consecutively to the sentence imposed for counts I and II. The trial judge then sentenced the defendant to a one year term of imprisonment for bond jumping which was to run consecutively to the two other sentences.

In this appeal, the defendant raises four issues. First, the defendant argues that the classification of marijuana as a Schedule I controlled substance under 21 U.S.C. §812(c)(10) (1976) is unconstitutional as an arbitrary and irrational classification. Second, Middleton asserts that he is a member of the Ethiopian Zion Coptic Church; that this is a religion within the meaning of the first amendment; and that the use of marijuana is an indispensible part of this religion. Consequently, Middleton argues that the application of the statute in this case would violate the free exercise clause of the first amendment. Third, the defendant argues that the trial court erred in refusing to instruct the jury on the defendant's theory of self-defense since the facts reasonably supported that defense to counts III through VII. Finally, Middleton contends that the evidence presented at trial was insufficient to support his conviction for bail jumping. We disagree with all of the above contentions and affirm the defendant's convictions on all counts.

I *Classification of Marijuana as a Schedule I Controlled Substance*

[1] Federal statutes are presumptively valid unless it be shown that the statute in question bears no rational relationship to a legitimate legislative purpose. *United*

States Railroad Retirement Board v. Fritz, 449 U.S. 166, 101 S.Ct. 453, 66 L.Ed.2d 368 (1980); *Vance v. Bradley*, 440 U.S. 93, 99 S.Ct. 939, 59 L.Ed.2d 171 (1979); *Marshall v. United States*, 414 U.S. 417, 94 S.Ct. 700, 38 L.Ed.2d 618 (1974); *United States v. Carolene Products Co.*, 304 U.S. 144, 154, 58 S.Ct. 778, 784, 82 L.Ed. 1234 (1938) ("where the legislative judgment is drawn in question, [judicial inquiries] must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it"). Recognizing this basic doctrine, Middleton nevertheless argues that this court should declare the congressional classification of marijuana as a Schedule I controlled substance unconstitutional as arbitrary and irrational.[1]

Under 21 U.S.C. §812 (1976), Congress has established five schedules of controlled substances. Subsection (b) of this statute requires that a drug or other substance placed in Schedule I must (a) have a high potential for abuse, (b) have no "currently accepted medical use in treatment in the United States," and (c) must lack "accepted safety for use . . . under medical supervision." *Id.*

At the hearing on the defendant's motion to dismiss, the defendant presented expert testimony that marijuana does not satisfy any of the Schedule I requirements. For example, Middleton called Dr. Thomas Ungerleider, an associate professor of psychiatry at UCLA, who

[1]Congress initially placed marijuana in Schedule I. Congress created the administrative procedure discussed at pages 7-8 *infra* by which changes in scheduling can be effected. *National Organization for the Reform of Marijuana Laws v. Drug Enforcement Agency*, 182 D.C. App. 114, 559 F.2d 735, 737-38 (1977).

testified that his research had led him to conclude that marijuana does not satisfy any of the three Schedule I requirements. In an effort to further support his position, Middleton called other witnesses including Robert Randall, a glaucoma sufferer, who testified that he was using marijuana to treat his loss of vision. Based on this evidence, the defendant argues that this court should substitute its judgment for that of Congress and reclassify marijuana.

[2] This evidence, however, is not sufficient to convince this court that it should interfere with the broad judicially-recognized prerogative of Congress. In rejecting a similar argument urging the judicial reclassification of cocaine, the Court of Appeals for the Ninth Circuit recognized that a court must limit its inquiry to whether a legislative classification or a refusal to reclassify is irrational or unreasonable. *United States v. Alexander*, 673 F.2d 287 (9th Cir. 1982). In *Marshall v. United States*, 414 U.S. 417, 94 S.Ct. 700, 38 L.Ed.2d 618 (1974) the Supreme Court stated that "legislative classification need not be perfect or ideal," 414 U.S. at 428, 94 S.Ct. at 707, and that "[w]hen Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation, even assuming, *arguendo*, that judges with more direct exposure to the problem might make wiser choices." *Id.* at 427, 94 S.Ct. at 706.

[3] In enacting the Drug Abuse Prevention and Control Act of 1970, Congress explicitly recognized:

> The extent to which marihuana should be controlled is a subject upon which opinions

> diverge widely. There are some who not only advocate its legalization but would encourage its use; at the other extreme there are some States which have established the death penalty for distribution of marihuana to minors.

H.R.Rep.No.91-1444, 91st Cong., 2d Sess., 12, *reprinted in* 1970 U.S.Code Cong. and Ad.News 4566, 4577. In this case, Middleton has failed to produce any evidence that the congressional classification is unreasonable or irrational. The determination of whether new evidence regarding either the medical use of marijuana or the drug's potential for abuse should result in a reclassification of marijuana is a matter for legislative or administrative, not judicial, judgment. *See United States v. Kiffer*, 477 F.2d 349 (2d Cir.), *cert. denied*, 414 U.S. 831, 94 S.Ct. 62, 38 L.Ed.2d 65 (1973); *United States v. LaFroscia*, 354 F.Supp. 1338 (S.D. N.Y.), *aff'd*, 485 F.2d 457 (2d Cir. 1973).

The Act contains a mechanism by which evidence such as that on which the defendant relies may be presented to the attorney general in order to determine whether a particular drug should be reclassified. *See* 21 U.S.C. §811 (1976). Faced with the issue of whether to compel reclassification, courts have approved of this mechanism as a means of properly evaluating any new evidence. *See United States v. Alexander*, 673 F.2d 287 (9th Cir. 1982); *United States v. Erwin*, 602 F.2d 1183 (5th Cir. 1979), *cert. denied*, 444 U.S. 1071, 100 S.Ct. 1014, 62 L.Ed.2d 752 (1980); *National Organization for the Reform of Marijuana Laws v. Drug Enforcement Agency*, 182 D.C.App. 114, 559 F.2d 735, 737-38 (1977) ("Recognizing that the results of continuing research

might cast doubts on the wisdom of initial classification assignments, Congress created a procedure by which changes in scheduling could be effected."); *United States v. Pastor*, 557 F.2d 930, 941 (2d Cir. 1977) ("the necessity for speedy, detailed and expert agency action in the area of drug technology cannot be disputed").

The record does not demonstrate that the present classification of marijuana is either arbitrary or irrational. Consequently, any reclassification of marijuana is a matter for legislative or administrative determination.

II *Free Exercise Class*

[4] Middleton also asserts that the federal statutes prohibiting the importation and possession of marijuana, as applied in this case, violate the free exercise clause of the first amendment of the United States Constitution. In support of this assertion, Middleton argues that he is a dedicated member of the Ethiopian Zion Coptic Church, that this church is a religion within the meaning of the first amendment, and that the use of marijuana is an essential part of his religious practice. In order to succeed, the defendant must prove both that the Ethiopian Zion Coptic Church is a religion within the meaning of the first amendment and that the statutes in question do not serve a compelling governmental interest.

The defendant argues that the strict daily regimen of the Coptic community in Jamaica and its focus on prayer services in which marijuana is an essential element conclusively demonstrate that the Ethiopian Zion Coptic Church is a religion within the protections of the first amendment. Assuming without deciding that the

Ethiopian Zion Coptic Church is a religion within the amendment's protections,[2] we hold that any interest of the defendant protected by the free exercise clause is outweighed by the compelling governmental interest in regulating and controlling the use of marijuana and its distribution in the United States. The free exercise clause "embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." *Cantwell v. Connecticut*, 310 U.S. 296, 303-04, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940). The Supreme Court has emphasized on numerous occasions that actions and practices are not absolutely protected from governmental regulation merely because the actor classifies these actions as "religious." *See, e.g., United States v. Lee*, ___ U.S. ___, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982) (social security taxes may be constitutionally imposed on persons who object on religious grounds to the payment of taxes to support public insurance funds); *Davis v. Beason*, 133 U.S. 333, 10 S.Ct. 299, 33 L.Ed. 637 (1890); *Reynolds v. United States*, 98 U.S. 145, 25 L.Ed. 244 (1878).

In *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), the Supreme Court reversed the conviction of an Amish farmer who had been convicted of violating Wisconsin's compulsory school attendance

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[2]Although we express to view as to whether the Ethiopian Zion Coptic Church is a religion for purposes of first amendment analysis, we note that other courts have held that any belief that is "arguably religious" is generally accorded protection, provided that the adherent is sincere in his belief and acts upon this belief in good faith. *Compare International Soc'y for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430 (2d Cir. 1981) *with United States v. Kuch*, 288 F.Supp. 439 (D.D.C. 1968).

law. The Court recognized the interest of the state regarding basic education, but held that the state interest is "not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the free exercise clause of the first amendment . . . ." *Id.* at 214, 92 S.Ct. at 1532. "The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Id.* 215, 92 S.Ct. at 1533. The Court examined the Amish's interest in maintaining its community structure and the state's interests in preparing citizens for effective and intelligent participation in the political system and in preparing self-reliant and self-sufficient participants in society. The Court then concluded that the state interests would not be sufficiently advanced by requiring Amish school children, who were enrolled until the completion of a basic education, to attend school for an additional two years. *Id.* at 222, 92 S.Ct. at 1536.[3]

Middleton urges that the court analogize between the structure of the Amish and Coptic communities and that *Yoder* therefore should control our disposition of the case at bar. However, even if we assume that such an analogy is proper (a contention upon which the

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[3] "[T]he value of all education must be assessed in terms of its capacity to prepare the child for life. It is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society as the majority live, but it is quite another if the goal of education be viewed as the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith."
Id.

court expresses no opinion), we find a difference in the nature of the governmental interests involved in the two cases. Unlike the state interest advanced in *Yoder*, the interest advanced by the government in the case at bar is compelling and would be substantially harmed by a decision allowing members of the Ethiopian Zion Coptic Church to possess marijuana freely. Congress has strongly and clearly expressed its intent to protect the public from the obvious danger of drugs and drug traffic. *See* 21 U.S.C. §801(2) (1976). Unquestionably, Congress can constitutionally control the use of drugs that it determines to be dangerous, even if those drugs are to be used for religious purposes. *United States v. Hudson*, 431 F.2d 468, 469 (5th Cir. 1970), *cert. denied*, 400 U.S. 1011, 91 S.Ct. 575, 27 L.Ed.2d 624 (1971) ("the use of drugs as part of religious practice is not constitutionally privileged"); *Native American Church of New York v. United States*, 468 F.Supp. 1247 (S.D.N.Y.1979), *aff'd*, 633 F.2d 205 (2d Cir. 1980); *Randall v. Wyrick*, 441 F.Supp. 312 (W.D.Mo.1977); *United States v. Kuch*, 288 F.Supp. 439 (D.D.C. 1968).

Extended to its logical conclusion, appellant's argument would protect all drugs, not just marijuana, if any religious group chose to use them as a religious sacrament. As this court noted in *Leary v. United States*, 383 F.2d 851 (5th Cir. 1967), *rev'd. on other grounds*, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969), both the fact of legislation and the severity of the penalties provided in statutes such as the one in question clearly evidence "the grave concern of Congress" in controlling the use of drugs. *Id.* at 859. Moreover, the harm of the particular drug in question is not relevant in determining the degree of protection afforded by the free exercise clause to the defendant's actions.

> Congress had demonstrated beyond doubt that it believes that marihuana is an evil in American society and a serious threat to its people. It would be difficult to imagine the harm which would result if the criminal statutes against marihuana were nullified as to those who claim the right to possess and traffic in this drug for religious purposes. For all practical purposes the anti-marihuana laws would be meaningless, and enforcement impossible. The danger is too great, especially to the youth of the nation . . . for this court to yield to the argument that the use of marihuana for so-called religious purposes should be permitted under the Free Exercise Clause. We will not, therefore, subscribe to the dangerous doctrine that the free exercise of religion accords an unlimited freedom to violate the laws of the land relative to marihuana."

Id. at 860-61. We cannot agree that the free exercise clause embodies the type of protection urged by the defendant in view of the clearly articulated and compelling governmental interests in regulating the possession and distribution of drugs.

In support of his argument, Middleton analogizes to various state court decisions which have held that the use of peyote by the Native American Church is constitutionally protected. This Court, however, remains bound by the *Leary* precedent and is not bound by these state court decisions.

In view of all of these factors, this court cannot agree with the defendant's argument that his possession of marijuana is constitutionally protected under the first amendment.

* * *

Affirmed

APPENDIX B

[FILED NOV 24 1982]

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-5321
81-5640

D.C. Docket No. 72-290-CR-CA
73-75-CR-CA

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CLIFTON RAY MIDDLETON,
Defendant-Appellant.

Appeals from the United States District Court
for the Southern District of Florida

Before HILL and CLARK, Circuit Judges, and SCOTT*, District Judge.

*Honorable Charles R. Scott, U.S. District Judge for the Middle District of Florida, sitting by designation.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of conviction of the said District Court in this cause be and the same is hereby AFFIRMED.

November 1, 1982

APPENDIX C

Library References

Drugs and Narcotics —47. C.J.S. Drugs and Narcotics §§105 to 107.

Code of Federal Regulations

Identification requirements, see 21 CFR 1310.01 et seq.

PART D—OFFENSES AND PENALTIES

§841. Prohibited acts A

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

§846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the

maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Pub. L. 91-513, Title II, §406, Oct. 27, 1970, 84 Stat. 1265.

Ch. 13 DRUG ABUSE PREVENTION

§952. Importation of controlled substances

Controlled substances in schedules I or II and narcotic drugs in schedules III, IV, or V; exceptions

(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter, except that—

* * *

§963. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Pub.L. 91-531, Title III, §1013, Oct. 27, 1970, 84 Stat. 1291.

APPENDIX D

§1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

APPENDIX E

TEXT OF AMENDMENTS TO THE CONSTITUTION

AMENDMENT [1]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

No. 82-900

In the Supreme Court of the United States

OCTOBER TERM, 1982

CLIFTON RAY MIDDLETON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the classification of marijuana as a Schedule I controlled substance, 21 U.S.C. 812(c)(10), lacks a rational basis.

2. Whether the trial judge properly denied petitioner's claim that because he was a member of the Ethopian Zion Coptic Church the First Amendment's Free Exercise Clause prohibited his prosecution for importing and possessing marijuana.

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 690 F.2d 820.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 1982. The petition for a writ of certiorari was filed on November 30, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of importation of marijuana, in violation of 21 U.S.C. 952(a) and 963; one count of possessing marijuana with intent to distribute, in violation of 21 U.S.C. 841 and 846; three counts of assaulting, resisting,

and impeding customs officers, in violation of 18 U.S.C. 111; and one count of bail jumping, in violation of 18 U.S.C. 3150.[1] He was sentenced to a total of two and one-half years' imprisonment. The court of appeals affirmed (Pet. App. 1-15).

1. The evidence adduced at trial showed that petitioner, a member of the Ethiopian Zion Coptic Church, flew from Jamaica to Miami on April 11, 1972. Upon his arrival, a customs inspector asked petitioner to accompany him to a room for a secondary search of his baggage. Petitioner fled the customs enclosure; he was pursued and caught by a number of customs personnel. When he was captured, petitioner attempted to fight off the law enforcement officers; he continued kicking and flailing as he was taken into the search room and later to a police station across the street. When petitioner was taken into custody, approximately three and one-half pounds of marijuana, including a package taped to his back (VII Tr. 80), were found in his possession. Pet. App. 4.

On April 14, 1972, petitioner was released on a $10,000 personal recognizance bond. He was subsequently arraigned on May 2 and trial was set for May 22, 1972. Petitioner failed to appear for trial on that date, however, and he remained a fugitive until his arrest in 1979 in connection with an indictment in another case.

2. Prior to trial, petitioner moved to dismiss his indictment on the grounds that the statutory prohibitions relating to marijuana are unconstitutional per se and that those

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[1]Petitioner was indicted on April 20, 1972, on two counts of importing and possessing marijuana and on five counts of resisting customs officers (Counts III-VII). He subsequently was indicted for bail jumping. At trial, the district court directed a verdict of not guilty on one of the importation counts and the jury acquitted petitioner on one of the counts of resisting customs officers.

prohibitions should not apply to him because of his membership in the Ethopian Zion Coptic Church. The trial judge denied this motion, petitioner was convicted, and the court of appeals affirmed.

ARGUMENT

1. Petitioner first contends (Pet. 3-11) that the inclusion of marijuana as a Schedule I controlled substance under 21 U.S.C. 812(c)(10) is arbitrary and irrational. Both courts below, however, correctly rejected this threadbare challenge to the constitutionality of the criminal statutes dealing with marijuana.

As the court of appeals recognized (Pet. App. 6), federal statutes are presumptively valid unless it is shown that the statute in question bears no rational relationship to a legitimate legislative purpose. See *Lewis* v. *United States*, 445 U.S. 55, 56 (1980); *Vance* v. *Bradley*, 440 U.S. 93, 97 (1979). And this Court has noted that "legislative classifications need not be perfect or ideal." *Marshall* v. *United States*, 414 U.S. 417, 428 (1974). In language particularly appropriate here, this Court has observed that "[w]hen Congress undertakes to act in areas fraught with medical and scientic uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation, even assuming, *arguendo*, that judges with more direct exposure to the problem might make wiser choices." *Id.* at 427.[2]

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[2]As the court of appeals noted (Pet. App. 8-9), when Congress enacted the Comprehensive Drug Abuse Prevention and Control Act in 1970, Pub. L. No. 90-513, 84 Stat. 1236, it recognized that there was a divergence of opinion on the extent to which marijuana should be controlled. See H.R. Rep. No. 91-1444 (Pt. 1), 91st Cong., 2d Sess. 12 (1970).

In light of these principles, the courts uniformly have rejected challenges similar to those petitioner advances here. *E.g., National Organization for the Reform of Marijuana Laws* v. *Bell*, 488 F. Supp. 123 (D.D.C. 1980) (three-judge district court); *United States* v. *Miroyan*, 577 F.2d 489, 495 (9th Cir.), cert. denied, 439 U.S. 896 (1978); *United States* v. *Gramlich*, 551 F.2d 1359, 1364 (5th Cir.), cert. denied, 434 U.S. 866 (1977); *United States* v. *Rogers*, 549 F.2d 107 (9th Cir. 1976); *United States* v. *LaFroscia*, 354 F. Supp. 1338 (S.D.N.Y.), aff'd, 485 F.2d 457 (2d Cir. 1973); *United States* v. *Spann*, 515 F.2d 579 (10th Cir. 1975); *United States* v. *Rodriquez-Camacho*, 468 F.2d 1220 (9th Cir. 1972), cert. denied, 410 U.S. 985 (1973). In the face of these settled principles and the drug's widespread abuse, it is clear that petitioner has not shown that the classification of marijuana under Schedule I is irrational or unreasonable.[3]

Moreover, we note that while 21 U.S.C. (& Supp. V) 811 provides a legislatively approved means for the Attorney General to reclassify marijuana, he is not required to do so. See *United States* v. *Alexander*, 673 F.2d 287, 289 (9th Cir. 1982); *United States* v. *Erwin*, 602 F.2d 1183, 1185 (5th Cir. 1979), cert. denied, 444 U.S. 1017 (1980); *National Organization for the Reform of Marijuana Laws* v. *DEA*, 559 F.2d 735 (D.C. Cir. 1977). Thus, any effort to alter the classification of marijuana should be addressed to the

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[3]"Furthermore the United States is a party to the Single Convention on Narcotic Drugs [18 U.S.T. 1407, T.I.A.S. No. 6298, New York March 30, 1961, ratified by the United States, 1967] binding *inter alia*, all signatories to control persons and enterprises engaged in the manufacture, trade and distribution of specified drugs. Marijuana (cannabis) is so specified." *United States* v. *Rodriquez-Camacho*, *supra*, 468 F.2d at 1222. Therefore, the government has an alternative basis for marijuana's control and classification. See 21 U.S.C. (Supp. V) 811(d).

Attorney General or the legislature. See *United States* v. *Pastor*, 557 F.2d 930, 941 (2d Cir. 1977); *United States* v. *Rodriquez-Camacho, supra*, 468 F.2d at 1222.[4]

2. Petitioner next contends (Pet. 11-21) that, as applied to him, the statutes prohibiting the importation and possession of marijuana violate the Free Exercise Clause of the First Amendment because he is a member of the Ethopian Zion Coptic Church, an organization that espouses marijuana use as part of its religious practice. The court below correctly rejected this claim as without merit.

This Court has long recognized that not all burdens on religion are unconstitutional. See *United States* v. *Lee*, 455 U.S. 252, 257 (1982); *Davis* v. *Beason*, 133 U.S. 333, 345 (1890) ("Crime is not the less odious because sanctioned by what any particular sect may designate as religion"). The court below correctly recognized (Pet. App. 12) that a statute may properly be subject to a balancing process when it impinges upon fundamental rights protected by the Free Exercise Clause. See *Wisconsin* v. *Yoder*, 406 U.S. 205, 214, 215 (1972); cf. *United States* v. *Lee, supra*.

The courts have also held uniformly that Congress may constitutionally control the use, even for religious purposes, of drugs that it determines to be dangerous. *Leary* v.

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[4]With respect to *National Organization for the Reform of Marijuana Laws* v. *DEA, supra*, on which petitioner relies (Pet. 10), we note that case was a civil action seeking marijuana's reclassification. In the instant case, however, petitioner committed a criminal offense and now seeks to challenge the statute under which he was found guilty. He thus can take no solace in the fact that the District of Columbia Circuit there ordered the DEA to conduct hearings concerning marijuana's classification. Moreover, in a later case, a three-judge district court recognized that the continuing debate over the long-term medical effects of marijuana alone justified its legislative classification. *National Organization for the Reform of Marijuana Laws* v. *Bell, supra*, 488 F. Supp. at 136.

United States, 383 F.2d 851 (5th Cir. 1967), rev'd on other grounds, 395 U.S. 6 (1969). See also *Native American Church* v. *United States*, 468 F. Supp. 1247, 1249 (S.D. N.Y. 1979), aff'd, 633 F.2d 205 (2d Cir. 1980); *United States* v. *Hudson*, 431 F.2d 468 (5th Cir. 1970), cert. denied, 400 U.S. 1011 (1971); *Randall* v. *Wyrick*, 441 F. Supp. 312 (W.D. Mo. 1977); *United States* v. *Kuch*, 288 F. Supp. 439 (D.D.C. 1968). In *Leary*, the Fifth Circuit carefully considered the legality of drug use as part of religious practice in light of the decisions of this Court. The court there held that the government had both the power and the duty to control the use of marijuana. It also observed that the paramount governmental interest in protecting society overrode any interest — even if religiously motivated —that the defendant might have had. 383 F.2d at 860. See also *Prince* v. *Massachusetts*, 321 U.S. 158 (1944); *Jacobson* v. *Massachusetts*, 197 U.S. 11 (1905); *Reynolds* v. *United States*, 98 U.S. 145 (1878).

The state interest involved in *Wisconsin* v. *Yoder*, *supra*, (compulsory state education requirement as applied to Amish children) cannot be equated with the government's compelling interest in controlling the dissemination of substances such as marijuana. The universal and serious problem of drugs requires a comprehensive response. See *United States* v. *Lee*, *supra* (social security taxes applicable to Amish employer). Accordingly, as the court below found, the government's interest in protecting society far outweighed petitioner's purported interest in using marijuana as part of his religious practice.[5]

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[5]Even if members of petitioner's church enjoyed a right to use marijuana, petitioner was not convicted of using the substance, but of importing it and possessing it with intent to distribute, both quite a different matter. Cf. *Stanley* v. *Georgia*, 394 U.S. 557 (1969).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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